

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA  
OAKLAND DIVISION

EDGARDO R. LEON,

Plaintiff,

vs.

WELLS FARGO BANK NA , et al.,

Defendants.

Case No: C 11-00182 SBA

**ORDER DISMISSING ACTION**

Dkt. 7

The parties are presently before the Court on Defendant Wells Fargo Bank N.A.'s ("Wells Fargo") motions to dismiss and strike, pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. 7. Wells Fargo noticed its motions for July 21, 2011. Under the version of Local Rule 7-3 in effect at the time the motions were filed, any opposition or statement of non-opposition should have been filed by no later than twenty-one days prior to the noticed hearing date. As such, Plaintiff's responses to the instant motions should have been due by June 28, 2011. Plaintiff did not file an opposition to the motions.

Although it could have granted the motions based on Plaintiff's failure to file any opposition,<sup>1</sup> the Court, in consideration of less drastic alternatives to dismissal, sua sponte continued the hearing on the motions and granted Plaintiff until July 20, 2011, to file a response. The Court warned Plaintiff that the failure to file an opposition or statement of non-opposition by July 20, 2011, would result in the dismissal of the action. Dkt. 23 at 2.

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<sup>1</sup> Paragraph 8 of the Court's Standing Orders expressly warns as follows: **"Effect of Failing to Oppose a Motion:** The failure of the opposing party to timely file a memorandum of points and authorities in opposition to any motion or request shall constitute a consent to the granting of the motion." Dkt. 18 at 5.

1 To date, Plaintiff has neither filed an opposition or statement of non-opposition to the  
2 motions to dismiss or strike.

3 **I. DISCUSSION**

4 “Pursuant to Federal Rule of Civil Procedure 41(b), the district court may dismiss an  
5 action for failure to comply with any order of the court.” Ferdik v. Bonzelet 963 F.2d  
6 1258, 1260 (9th Cir. 1992). As such, the failure to file an opposition to a motion to dismiss  
7 in the manner prescribed by the Court’s Local Rules is grounds for dismissal. Ghazali v.  
8 Moran, 46 F.3d 52, 53 (9th Cir. 1995) (per curiam). “In determining whether to dismiss a  
9 claim for failure to prosecute or failure to comply with a court order, the Court must weigh  
10 the following factors: (1) the public’s interest in expeditious resolution of litigation; (2) the  
11 court’s need to manage its docket; (3) the risk of prejudice to defendants/respondents;  
12 (4) the availability of less drastic alternatives; and (5) the public policy favoring disposition  
13 of cases on their merits.” Pagtalunan v. Galaza, 291 F.3d 639, 642 (9th Cir. 2002).

14 In the instant case, the Court finds that the above-referenced factors weigh in favor  
15 of dismissal. With regard to the first factor, “[t]he public’s interest in expeditious  
16 resolution of litigation always favors dismissal.” Yourish v. Cal. Amplifier, 191 F.3d 983,  
17 990 (9th Cir. 1999). This is particularly true in the instant case, where Plaintiff has  
18 impeded the Court’s ability to move this case forward by failing to respond to Wells  
19 Fargo’s motions and failing to comply with the requirements of the Court’s scheduling  
20 orders.

21 The second factor also militates in favor of dismissal. See Pagtalunan, 291 F.3d at  
22 642 (“It is incumbent upon the Court to manage its docket without being subject to routine  
23 noncompliance of litigants”); Yourish, 191 F.3d 983, 990 (9th Cir. 1999) (recognizing  
24 court’s need to control its own docket); see also Ferdik, 963 F.2d at 1261 (non-compliance  
25 with a court’s order diverts “valuable time that [the court] could have devoted to other  
26 major and serious criminal and civil cases on its docket.”).

27 The third factor, the risk of prejudice to the defendants, generally requires that “a  
28 defendant ... establish that plaintiff’s actions impaired defendant’s ability to proceed to trial

1 or threatened to interfere with the rightful decision of the case.” Pagtalunan, 291 F.3d at,  
2 642. At the same time, the Ninth Circuit has “related the risk of prejudice to the plaintiff’s  
3 reason for defaulting.” Id. Here, Plaintiff has offered no explanation for his failure to  
4 respond nor is any apparent from the record. Indeed, Plaintiff has had over four months to  
5 prepare his opposition. These facts also weigh strongly in favor of dismissal. See Yourish,  
6 191 F.3d at 991; Ghazali, 46 F.3d. at 54.

7 As to the fourth factor, the Court has already considered less drastic alternatives to  
8 dismissal. As noted, the Court’s Standing Orders warn that as a consequence of a party’s  
9 failure to oppose a motion, the Court will construe such inaction as a consent to the  
10 granting of the unopposed motion. In addition, the Court sua sponte afforded Plaintiff a  
11 second opportunity to file an opposition (or statement of non-opposition), and again warned  
12 him that the failure to respond would result in the dismissal of the action. “[A] district  
13 court’s warning to a party that failure to obey the court’s order will result in dismissal can  
14 satisfy the ‘consideration of [less drastic sanctions]’ requirement.” Ferdik, 963 F.2d at  
15 1262.

16 The final factor, which favors disposition of cases on the merits, by definition,  
17 weighs against dismissal. Pagtalunan, 291 F.3d at 643 (“Public policy favors disposition of  
18 cases on the merits. Thus, this factor weighs against dismissal.”).

## 19 **II. CONCLUSION**

20 In sum, the Court concludes that four of the five relevant factors weigh strongly in  
21 favor of dismissing the action in its entirety. Id. (affirming dismissal where three factors  
22 favored dismissal, while two factors weighed against dismissal).<sup>2</sup> Accordingly,

23 IT IS HEREBY ORDERED THAT the instant action is DISMISSED WITHOUT  
24 PREJUDICE, pursuant to Federal Rule of Civil Procedure 41(b). The Clerk shall close the  
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27 <sup>2</sup> Although NDEX did not join in Wells Fargo’s motion, the Court notes that the  
28 relevant considerations under Rule 41(b), as set forth above, apply to the entirety of the  
action, as opposed to Wells Fargo exclusively.

1 file and terminate all pending matters and deadlines. The hearing scheduled for September  
2 13, 2011, is VACATED.

3 IT IS SO ORDERED.

4 Dated: July 27, 2011

  
5 SAUNDRA BROWN ARMSTRONG  
6 United States District Judge  
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10 Case Number: CV11-00182 SBA

11 **CERTIFICATE OF SERVICE**

12 I, the undersigned, hereby certify that I am an employee in the Office of the Clerk, U.S. District  
13 Court, Northern District of California.

14 That on July 28, 2011, I SERVED a true and correct copy(ies) of the attached, by placing said  
15 copy(ies) in a postage paid envelope addressed to the person(s) hereinafter listed, by depositing  
16 said envelope in the U.S. Mail, or by placing said copy(ies) into an inter-office delivery receptacle  
17 located in the Clerk's office.

18 Edgardo R. Leon  
19 4347 Bidwell Drive  
20 Fremont, CA 94538

21 Dated: July 28, 2011

Richard W. Wieking, Clerk

22 By: LISA R CLARK, Deputy Clerk  
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